United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2592

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 74-2592

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PETER BARTOK,

Plaintiff-Appellant,

-v-

BOOSEY and HAWKES, INC., and
BENJAMIN SUCHOFF, as Trustee of
the Estate of Bela Bartok,

Defendants-Appellees.

BRIEF OF APPELLEE, BENJAMIN SUCHOFF, AS TRUSTEE OF THE ESTATE OF BELA BARTOK.

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BRIEF OF APPELLEE BENJAMIN SUCHOFF,
AS TRUSTEE OF THE ESTATE OF BELA BARTOK

The Issue

The issue is whether the District Court was correct in its determination that a musical composition on which copyright was obtained by the publisher six months after the composer's death is a "posthumous work" for purposes of Section 24 of the Copyright Law, 17 U.S.C. § 24.

Statement of the Case

Plaintiff, a son of the composer Bela Bartok, sued for a declaratory judgment that Concerto For Orchestra on which copyright was first obtained on March 20, 1946, six months after the

composer's death, is not a "posthumous work" under Section 24 of the Copyright Act.

The defendants are Boosey & Hawkes, Inc., Bela Bartok's publishers and Dr. Benjamin Suchoff, Successor Trustee of the residuary trust under Bela Bartok's Will for the benefit of the composer's widow for life with remainder to plaintiff.

Plaintiff moved for summary judgment and each of the defendants cross-moved for the same relief. The appeal is from the District Court's Order granting defendants' applications.

If Concerto for Orchestra, one of the composer's most popular works is a posthumous work, the renewal term can be claimed by Boosey & Hawkes as proprietor, but if it is not a posthumous work, the renewal term belongs to the composer's widow and children, plaintiff and another son residing in Hungary.

However, Boosey & Hawkes have only a nominal stake in the outcome of the litigation. As a result of contractual arrangements,neither the right to publish nor the amount of royalties to be paid (Appendix, p.58a) will be affected by the Court's decision. If plaintiff is successful, the royalties will be paid one-third each to plaintiff, his mother and his half-brother, or their respective heirs, successors and assigns for the duration of the renewal term. If defendants are successful, the entire royalties will be paid to the defendant Benjamin Suchoff, as

Trustee, during the widow's lifetime for her benefit and after the termination of the Trust on her death, would be paid to plaintiff for the remainder of the renewal term.

Boosey & Hawkes, Ltd., the English affiliate of defendant Boosey & Hawkes, published the Concerto pursuant to an agreement it made on May 25, 1939 with Bela Bartok who then was residing in his native Hungary (Appen. p.15a). Essentially, the agreement entitled the publisher to world-wide copyrights for all the composer's works completed during the five year term of the agreement which was automatically renewable (Appen. p.19a) and renewed subject to payment of stipulated royalties (Appen. pp.18a-19a) and fulfillment of other obligations.

Concerto for Orchestra was commissioned by the Koussevitsky Music Foundation in 1943 (Appen. p.6a). The composer assigned the copyright to Boosey & Hawkes in November of that year (Appen. p.24a-27a). The Concerto was performed by the Boston Symphony Orchestra in Boston in December, 1943 and in New York in January 1944 with one of the performances broadcast on radio.

While the long and tortuous work of correcting and revising proofs was under way (Appen. p.71a,81a-89a) -- the composer's contract with Boosey & Hawkes called for first and second proofs (Appen. p.16a) -- Bela Bartok, who had been ill with

leukemia (Appen. p.), died in September, 1945. Six months later the work was published. The copyright registration stated that the composer was "Bela Bartok, of Hungary, Deceased." (Appen. p.61a).

The Relevant Statute

The right to the renewal term of a copyright is determined by Section 24 of the Copyright Act, 17 U.S.C. § 24, a copy of which is attached as Exhibit "A" to this brief for the convenience of the Court.

Argument

CONCERTO FOR ORCHESTRA IS A POSTHUMOUS WORK WITHIN THE MEANING OF SECTION 24 OF THE COPYRIGHT LAW.

Section 24 of the law on Copyrights states that the initial copyright term secured under the statute " . . . shall endure for twenty-eight years after the date of first publication . . . " and provides for a renewal terms, to be obtained in a prescribed manner, which " . . . in the case of any posthumous work . . . upon which the copyright was originally secured by the proprietor thereof . . . the proprietor . . . shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years . . . " These provisions must be read and interpreted in the context of the entire copyrights statutory scheme.

In essence, the Copyrights Law grants protection to literary, musical and other works for a limited period secured by and commencing with publication with notice of copyright (17 U.S.C. § 10) or from date of registration and deposit as an unpublished work (17 U.S.C. § 12). The statutory copyright is not the only copyright protection available to an author (17 U.S.C. § 2). It is, however, the only protection available to an author of a published work. Prior to publication, the author is protected by a common law copyright of unlimited duration (17 U.S.C. §2). Inasmuch as the limited term of a statutory copyright also commences upon the deposit (under Section 12) of an unpublished work (Marx v.United States, 96 F.2d 204), such registration is costly, cutting into the term of protection. Therefore, authors frequently prefer to rely on the protection afforded by the common law copyright and the interpretation of law which permits certain limited exploitation of copyrightable works, including commercial performances of dramatic and musical works,prior to and without publication, by not regarding such exploitation as a publication which destroys the common law copyright.

The basic operative act under the statute is publication with notice (17 U.S.C. §10). The right to the renewal term accrues on the commencement of the last or twenty-eighth year of the original term. The renewal term in some respects is treated

as an independent term separately secured by compliance with the statute and not necessarily derived from ownership of the original term. In the ordinary case, the right to the renewal term belongs to the author if he is alive on the commencement of the twenty-eighth year of the original term. If the author is then deceased, the statute provides alternate classes of entitlement to the renewal term commencing with the widow and children. However, certain works such as works made for hire, composite works and posthumous works are singled out for special treatment. The proprietor of the copyright is given the right to the renewal term. In this context, the words "any posthumous work" found in Section 24 logically must be interpreted to refer to a work first published with copyright notice so as to obtain statutory copyright protection after the death of the author or composer. This is in accord with the only reported case which has dealt with the matter, albeit as dicta.

In Shapiro, Bernstein & Co. v. Bryan, 123 F.2d 697, this Court said, referring to what is now Section 24:

> "Section 23 starts by fixing the duration of a copyright, and then grants the right of renewal in two provisos. The first . . . provides for 'posthumous' works, i.e. those on which the original copyright has been taken out by someone to whom the literary property passed before publication." (p.699)

The plaintiff in dealing with the meaning of this somewhat elliptical statement dwells largely on the word "passing". Plaintiff

avoids the fairly obvious interpretation that the court, discussing the statute pursuant to which copyright is secured, defines a "posthumous" work as a work for which the original copyright was secured after the death of the author by someone to whom the literary property had passed by whatever means before publication. § 24 is explicit that a posthumous work is one "upon which the copyright was originally secured by the proprietor thereof."

The Copyright Law contains no definition of the word "posthumous". "Posthumous" is not a legal word of art. Black's Law Dictionary (3rd Ed., West Publishing Co., P 33) contains no definition of the word. The only reference is to the phrase "posthumous child" defined as "one born after the death of the father; or, when a Caesarian operation is performed, after that of the mother."

In the case of a word which does not have a special, established legal meaning and which is not defined in the statute, the meaning attributed by ordinary usage should be followed where such meaning is consistent with the statutory purpose. Webster's New International Dictionary defines "posthumous" as follows:

> "Posthumous . . adj. [L.L. posthumus . . L. posthumus, prop., last, hence, late born (children born after father's death, or after he had made his will . . . 1. Born after the death of the father; . . .
>
> 2. Published after death of its author; . . .
>
> 3. Following or occurring after one's death; . . " Webster's New International Dictionary, unabridged, 2nd Edition, G & C Merriam Co. 1959.

Plaintiff stresses that Concerto for Orchestra was publicly performed during Bartok's lifetime and that he personally had assigned the copyright to the publisher to establish that it is not a posthumous work despite the copyright having been first obtained by publication after Bartok's death. As was pointed out by the court below, using an example from Chopin, the designation of a work as "posthumous" is not inconsistent with the work having been performed during the composer's lifetime. To use such a test as performance during the composer's lifetime to remove a work from the "posthumous" category would introduce great uncertainty into the law. How many performances would be necessary and under what circumstances? The issue might require substantial investigation into events as to which there was no reliable record and undoubtedly would entail also a qualitative evaluation of the performance or performances. These problems, coupled with the fact that such performances for the protection of authors are not regarded as publication and therefore are events dehors the Copyright Law, make it neither reasonable nor desirable that the determination of whether or not a work is "posthumous" for the purposes of the statute should depend thereon.

The fact of the composer having personally assigned to the publisher the right to secure copyright, the second factor relied upon by the plaintiff, raises a circumstance which may not have been conceived of or considered by the draftors of the

legislation.* Although the courts have had no prior occasion to consider this question, the possibility of such question arising has been raised by various writers in the field.

Ball, a recognized authority in this field, conceived of the very situation now before the Court and expressed the view that a work such as Concerto for Orchestra would be "posthumous":

> "A posthumous work is one originally published and copyrighted after the author's death by one who became the proprietor of the literary property therein as a legatee of the author, or by virtue of the laws of intestate succession, or perhaps by an assignment during the author's lifetime."
> (Interlineation added)
> Ball, Horace G., The Law of Copyright and Literary Property, Matthew Bender & Co. 1944, § 89, p. 195.

In the above-mentioned study by Miss Ringer,(now Commissioner of Copyrights), probably the most exhaustive study on the question of renewal of copyright, Miss Ringer concludes that assignment of a copyright by an author of a work not published until after his death would not affect such work being regarded as "posthumous", under Section 24 as follows:

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*Ringer, Renewal of Copyright, Copyright Law Revision Study prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, 86 Cong.2d Sess., U.S. Gov't Ptg. Office, see p. 127.

"As we have seen, 'posthumous works' appeared in the 1906 - 08 bills as an exception to the life-plus term, for the reason that in such cases it was thought inappropriate to base the term on the author's life. This exception was spliced onto the renewal provision as one of the works which the proprietor could renew in his own right, but without definition or regard for the consequences. As a result, both the meaning of the term 'posthumous work' and its consequences in the renewal section are obscure.

The generally-accepted definition of 'posthumous work' is 'one which is published subsequent to the death of its author'. If this is what the phrase means in § 24, the author's widow and children, executors, or next of kin, as such, have no renewal rights whatsoever in works first published after the author's death. Thus, an assignment by the author of the rights in his unpublished works would cut off his family's renewal rights in any such works that are not published before he dies. This result was undoubtedly not intended, and has been strongly criticized, but it is supported by the one judicial comment on the provision, and probably represents a correct interpretation of the law." Ibid, pp. 128-129 (Interlineation added.)

That this has been the accepted meaning of the words "posthumous work" is demonstrated also by the instructions found on the back of the application for renewal issued by the Copyright Office. Under the heading "Information Concerning Renewal Copyright" and the secondary heading "Who may claim renewal" appears the following:

"B. In the case of the following four types of works, the proprietor [owner of the copyright at the time of renewal registration] may claim renewal:
1. Posthumous work [work first published and copyrighted after the death of the author]."
U.S. Copyright Office, Form R as printed by the Government Printing Office, January 1971.

Miss Ringer's study, now some 14 years old, the above-quoted Copyright Office form and the texts referred to in this and the other briefs before the Court are ample to have alerted the legislature to the issue concerning the meaning of the word "posthumous" in Section 24 of the Copyright Law. Despite the extensive and continuing consideration being given to revision of the Copyright Law and the actual adoption of several amendments in 1971*, it is significant that there has been no proposal to modify Section 24 to define the meaning of "posthumous" as used therein. This should be interpreted as the legislature's agreement with the meaning attributed to "posthumous" by the Copyright Office.

The composer's execution of the assignment of copyright to Boosey & Hawkes was an incidental, routine act. It was the transfer of world-wide rights to copyright and the fulfillment of a contractual obligation which would have been binding upon the composer's estate had he by chance failed to execute an assignment of copyright prior to death. In such event, his executors, to whom he bequeathed in trust all of his unpublished works (Appen. p.74a), would have been required to execute the assignment. In these circumstances, there was no such special dealing with the work as to make its removal from the "posthumous" category imperative.

*Public Law 92-140, U.S. Code Congressional and Administrative News, 1971, 92nd Congress - 1st Session, Vol. I, West Publishing Co.

Plaintiff and amicus curiae stress "intent" -- legislative intent and composer's intent -- as requiring a determination that Concerto for Orchestra is not a posthumous work. Insofar as concerns legislative intent, the point is without basis. The legislature gave no special consideration to the use of the word "posthumous".

The general legislative intent to treat the renewal term as a separate term and to protect the author and his family in respect thereof is of limited relevance in connection with "posthumous" works which the statute in any case singles out for special treatment. There is a far more basic and widespread situation in which there appears to have been a failure on the part of the legislature to protect the author: Where an author in the assignment of the original copyright has included an assignment of the right of renewal, the proprietor's right to the renewal term has been upheld as against an author who is alive at the beginning of the twenty-eighth year of the original term.* In view of this very important area where the author's right to renewal goes unprotected, is there any justification for the courts to determine that the legislature intended to exclude from the category of "posthumous work" one for which the copyright has been assigned by the author prior to his death, as a device to prevent the proprietor from securing the renewal term?

* Fisher Music v. Witmark & Sons, 318 U.S.643, 63 S.Ct. 773; Tobani v. Fischer, 98 F.2d 57, Cert. denied, 305 U.S. 650.

If the composer's intent is to be considered, classifying this work as "posthumous" clearly would fulfill the composer's intention as expressed in his Will where he favored his wife above his other heirs and in bequeathing the residue in trust for her benefit, said:

> "There shall be deemed included in this residuary bequest all of my copyrights, all rights of renewal copyrights which I may now have or may hereafter acquire, and all rights in unpublished manuscripts. So long as the trust shall be in force my executors and trustees are specifically empowered to exercise any rights of renewal copyright which may arise with respect to any of my compositions under the laws of the United States of America." (Appen. pp. 74a-75a).

In respect of certain of his works, the composer's intent has been frustrated by his inability to control the rights to the renewal term. Why thwart it here by adding conditions to and limitations upon the word "posthumous", as used in the statute, for which there is no basis in the legislative history when classifying this work, published and copyrighted after the composer's death, as "posthumous" will fulfill his intent?

Plaintiff and amicus argue strenuously that "posthumous" should be limited by conditions to which the statute makes no reference so as to avoid grasping, over-reaching publishers from gaining outright control of an author's work during his life and delaying publication until after his death so as to deprive him and his family of the renewal term.

These apprehensions have little, if any, validity. Publishers do not speculate on the demise of the authors they publish. They secure works for publication with a view toward early profits and an awareness of present tastes. They do not hold works for later publication, thereby speculating on public taste and interest during a future period. Except in the case of works made for hire, authors and composers usually have a contractual right to enforce publication within a reasonable period or by a specified date and reserve royalty rights rather than transfer works outright.

The fact that in this, the first case in the 64 years since the statute took effect, engrafting modifications on the usual meaning of the word "posthumous", so as to eliminate the work in question from that category, has no practical consequence for the defendant-publisher and frustrates the composer's testamentary plan, is sufficient reason for this Court also to give "posthumous" its usual and ordinary meaning for purposes of Section 24. In arguing against affirmance, plaintiff and amicus curiae argue the adverse consequences of such decision in a hypothetical case, which has not arisen in the 64 year history of the statute, rather than the case actually before the Court.

Plaintiff directs the Court's attention to the fact that the British Copyright Law of 1956 excludes from the classiiication of "posthumous" works which prior to the author's death have been performed in public, broadcast, etc. This has no relevance to the present U.S. statute from which it is significantly different. The term of protection under the British statute is the life of the author plus fifty years, or in the case of posthumous works fifty years from the date of first publication. In view of this generous term of protection now under consideration also by Congress*, the rationale of excluding from the "posthumous" category works which have been exploited during the author's lifetime is clear.

The provision to which plaintiff refers in the British Copyright statute is an expression of British policy intended to prevent a period of protection without limit for a work which is actually being commercially exploited. There is no renewal term in England. Whether or not a work is posthumous has no effect on the ownership of the copyright.

The argument is advanced in the brief of amicus curiae that "publication" as used in Section 24 has multiple

*Bulletin of the Copyright Society, Vol. 22, p. 1 (October 1974).

meanings in that the words "first publication" in the last line of the section has been interpreted also to encompass the deposit of an unpublished work under Section 12 and, under a 1971 amendment to Section 26, the issuance of "sound recordings." The inclusion of the Section 12 deposit, as is made clear by Marx v. U. S , supra, arose from the need for constitutional reasons to limit the term of protection secured by the deposit of an unpublished work. The amendment to §26 reflects an attempt by Congress to meet the problem created by modern technology and the popular music scene where the old stand-by sheet music is by-passed and the basic exploitation of popular music is by sound recordings.

CONCLUSION

Neither the language of Section 24, the overall plan of the Copyright Act, the legislative history of the provision concerning the renewal of copyright for "posthumous works", nor the practical exigencies of the case before the Court require or justify an interpretation of "posthumous" in Section 24 as meaning anything other than a work first published

and copyrighted after the author's death by a proprietor who has acquired the work and is entitled to secure copyright protection under the Copyright Act.

Respectfully Submitted,

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EXHIBIT "A"

§ 24. Duration; renewal and extension

The copyright secured by this title shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: Provided, That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: And provided further, That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly

registered therein within one year prior to the expiration of the original term of copyright: And provided further, That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication.

EXHIBIT "A"